8-25-2011

Reed v. State Appellant's Brief Dckt. 37773

IN THE SUPREME COURT OF THE STATE OF IDAHO

o0o

JONATHAN DEREK REED,

Petitioner - Appellant,

v.

STATE OF IDAHO,

Respondent.

No. 37773

APPELLANT'S BRIEF

o0o

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

HONORABLE CHERI C. COPSEY
District Judge

JONATHAN D. REED
80232 ICC / R 18 B
P.O. Box 70010
Boise, Idaho 83707
(208) 331-2760

APPELLANT *pro se*

LAWRENCE G. WASDEN
Attorney General, State of Idaho
Criminal Law Division
P.O. Box 83720
Boise, Idaho 83720-0010
(208) 334-2400

ATTORNEY FOR RESPONDENT

STATEMENT OF THE CASE

Nature of the Case

Jonathan D. Reed appeals from the district court's Final Order Denying Post Conviction Relief. Mr. Reed asserts that the district court erred by denying his attorney from arguing ineffective counsel at evidentiary hearing due to deficiencies in the pro se petition. Mr. Reed asserts that fundamental error occurred when trial counsel failed to adequately communicate a plea offer resulting in prejudice. Mr. Reed also asserts his right to have initially pled guilty prior to the filing of the Amended Information Count II, thereby avoiding exposure to the persistent violator enhancement.

Statement of Facts and Course of Proceedings

On March 5, 2008, Mr. Reed pleaded guilty to the crimes of failure to register as a sex offender and of being a persistent violator of law. (R., p.4.) The court retained jurisdiction; ordering Mr. Reed to undergo a sex offender evaluation program from within the department of correction "Rider" program. Mr. Reed secured a favorable recommendation for probation stating he was/is amenable to treatment in the community. The district court parted from the recommendation and imposed a unified sentence of twenty five years with three years fixed. (R., p.5.) On March 27, 2009, Mr. Reed sought reduction of the sentence pursuant to ICR 35. (R., p.5.) The district court concluded the filing was frivolous and denied relief. On January 6, 2010, Mr. Reed filed a petition for Post-Conviction Relief.[1] (R., p.4-11.)

[1] A file stamp was placed upon the petition on January 8, 2010. (R. p.4.) However, it was filed January 6, 2010 when he placed it into the prison mail system. *See* Shelton v. Shelton, 148 Idaho 560, 565, 225 P.3d 693, 698 n.6 (2009).

In his *pro se* verified petition[2], Mr. Reed asserted the following grounds for relief:

> 8 (c) The Petitioner was initially appointed counsel through the office of the Ada County Public Defender's Office. Attorney's Richard D. Toothman and Eric R. Rolfsen were assigned to represent Mr. Reed. Following the arraignment a Preliminary Settlement offer was tendered by Deputy Ada County Prosecuting Attorney "CAG". Defense counsel never appraised the Petitioner of the offer to plead guilty to Count I of the Information in exchange for a sentencing recommendation of one (1) year fixed, four (4) years indeterminate. Failing to disclose this offer amounts to ineffective assistance of counsel. Mr. Reed was prejudiced by counsels [*sic*] deficient performance. (R., p.6.)
>
> 8 (d) Unaware of the aforementioned plea offer, the Petitioner hired Jared B. Martens, a private attorney to represent him. Notice of Substitution of counsel was filed on or about February 25, 2008. Mr. Reed expressed a desire to plead guilty to which Mr. Martens inquired as to the rationale to reject the earlier plea offer. It was then learned the offer was no longer available. Ada Public Defender's withheld critical information from the Defendant, which amounts to ineffective assistance of counsel. The proximate result of their deficient performance was realized when the Court, on January 8, 2008, granted the State leave to file an Amended Information, Count II, Persistent Violator, I.C. § 19-2514, a charge that carries a potential life sentence. The Defendant had an absolute right to have plead guilty when he first expressed a desire to do so with his former government appointed attorney's Messrs. Toothman and Rolfsen. Mr. Reed suffered an undeniable prejudice when the Court sentenced Defendant to twenty-five (25) years given he had requested to plead guilty to Count I, prior to the filing of the enhanced charge. (R., p.6.)

The district court later appointed counsel to represent the petitioner. (R., p.12)

In point of fact, a significant mistake occurred when another inmate typed Mr. Reed's petition, thereby misstating the facts outlined in claim 8(d). Mr. Reed then inadvertently signed the verified pleading without noticing the error and subsequently filed it with the court. (Tr. p.29 – *sic passim*)

Testimony was elicited at the hearing sufficient to explain such oversight as contained within Mr. Reed's application. Mr. Reed, being untrained in the law, attempted to protect his

[2] Although the appellant signed and swore to the contents within the verified petition, another inmate / lay assistant actually drafted and prepared the pleading in Mr. Reed's behalf.

claims from a strict interpretation or analysis of his *pro se* petition by denoting an entire paragraph to avoid any undue scrutiny. (R., p.7-8 ¶ 12) Notwithstanding these facts, the district court refused to permit appointed counsel from curing the deficiency within claim (8d), or, from arguing the cumulative impact that inadequate communication of the plea offer, or insufficient advice in which to consider the plea, amounted to ineffective assistance of counsel. (Tr. p.92, 95)

ISSUE

1. Did the district court err in dismissing claim's 8 (c), 8(d) of Mr. Reed's Petition for Post-Conviction Relief because the evidence presented met the preponderance of evidence threshold sufficient to warrant relief.

ARGUMENT

I.

The District Court Erred Erred In Dismissing Claim's 8 (c), 8(d) Of Mr. Reed's Petition For Post-Conviction Relief Because The Evidence Presented Met The Preponderance Of Evidence Threshold Sufficient To Warrant Relief.

A. Introduction

Mr. Reed asserts that the district court erred by dismissing his claims.

B. Standard Of Review In Post-Conviction Cases

An application for post-conviction relief initiates a proceeding that is civil in nature. *Goodwin v. State*, 138 Idaho 269, 271, 61 P.3d 626, 628 (Ct. App. 2002) (citing *State v. Bearshield*, 104 Idaho 676, 678m 662 P.2d 548, 550 (1983); *Clark v. State*, 92 Idaho 827, 830, 452 P.2d 54, 57 (1969); *Murray v. State*, 121 Idaho 918, 921, 828 P.2d 1323, 1326 (Ct. App. 1992)). The *Goodwin* Court continued that, "[s]ummary dismissal of an application pursuant to I.C. § 19-4906 is the procedural equivalent of summary judgment under I.R.C.P. 56." *Goodwin*, 138 Idaho at 271, 61 P.3d at 628 (citations omitted). "Like a plaintiff in a civil action, the applicant must prove by preponderance of evidence the allegations upon which the request for post-conviction relief is based." *Id.* Moreover, "[a]n application for post0-conviction must contain much more than 'a short and plain statement of the claim' that would suffice for a complaint under I.R.C.P. 8(a)(1)." *Id.* The *Goodwin* Court noted that, "an application for post-conviction relief must be verified with respect to facts within the personal knowledge of the applicant, and affidavits, records or other evidence supporting its allegations must be attached, or the application must state why such supporting evidence is not included with the application." *Id.* at 271-272, 61 P.3d at 628-629 (citation omitted). "In other words, the application must present

or be accompanied by admissible evidence supporting its allegations, or the application will be subject to dismissal." *Id.* at 272, 61 P.3d at 629.

The appellate court will exercise free review of the district court's application of the relevant law to the facts. *Nellsch v. State*, 122 Idaho 426, 434, 835 P.2d 661, 669 (Ct. App. 1992). The review of a "district court's construction and application of a statute, the Uniform Post-Conviction Procedure Act (UPCPA), is a matter of free review." *Evensioski v. State*, 136 Idaho 189, 190, 30 P.3d 967, 968 (2001) (citations omitted).

On review of a summary dismissal of a post-conviction relief petition following an evidentiary hearing, the appellate court determines whether the, affidavits and other evidence presented at the evidentiary hearing entitle the applicant to relief. *Berg v. State*, 131 Idaho 517, 960 P.2d 738, 740 (1998); *Martinez v. State*, 126 Idaho 813, 816, 892 P.2d 488, 492 (Ct. App. 1995). Ultimately, a petitioner for post-conviction relief has the burden of proving, by a preponderance of the evidence, the allegations on which his claims are based. *ICR* 57(c). After dismissal of a petition for post-conviction relief, the reviewing court exercises free and independent review of the district court's application of law, including constitutional issues. *Estrada v. State*, 143 Idaho 558, 561 (2006).

In claim 8(c), Mr. Reed asserted that he had received ineffective assistance of counsel when his attorney failed to inform him the state had extended an offer to plead guilty to Count I of the Information in exchange for a sentencing recommendation of one (1) year fixed, four (4) years indeterminate. Mr. Reed was prejudiced by counsels [*sic*] deficient performance. (R., p.6.) Mr. Reed did not supply additional information in support of this claim attached to the original petition. However, he did request the information be made available as part of the application. (R., p.7 ¶ 9-10). Counsel for Mr. Reed then filed a Motion to Unseal Pre-Sentence Report (R.,

p.24-25.) The district court convened a status hearing March 3, 2010 (Tr.p.5-10) to address counsel's motion, therein several affidavits were brought to the district courts attention, where ultimately, the evidentiary hearing was set for May 12, 2010. (Tr.p.11-96)

In this instance, a factual issue was raised as to whether Mr. Reed received ineffective assistance of counsel when his attorney did not advise him of the one (1) plus four (4) plea offer; or fully inform Mr. Reed of the range of applicable choices going forward; the primary goals of representation, or that the plea offer would be null and void if he proceeded to the preliminary hearing. Moreover, Mr. Reed was never advised that proceeding to a preliminary hearing would wantonly expose him to a potential life sentence by means of an Amended Information, Count II, Persistent Violator, I.C. § 19-2514.

Testimony elicited at the evidentiary hearing demonstrated there was a reasonable probability that Mr. Reed would have accepted the plea offer. Former defense counsel Mr. Rolfsen testified that: "...it didn't look like a very good case". (Tr.p.66, Ln. 11) Counsel agreed that due to Mr. Reed's high likelihood of conviction, coupled with exposure to the persistent violator enhancement, that there wasn't a legal or factual defense to the case. (Tr.p.81, Ln.3-25)

Mr. Reed has made a sufficient showing through admissible evidence that the proper course of action was for the district court to grant relief as prayed for in the petition.

Because Mr. Reed has met the burden of showing that the preponderance of the evidence demonstrates he received ineffective assistance of counsel, and, that he was prejudiced by counsel's actions and/or inaction. The district court incorrectly applied the law in dismissing his petition.

CONCLUSION

Mr. Reed's claims satisfy those requirements sufficient to demonstrate ineffective counsel set forth in *Strickland* and its progeny.

For the reasons set forth above, Mr. Reed asks that this Court reverse the Final Decision Denying Post-Conviction Relief, and further, that the Court grant summary disposition in favor of the appellant.

Respectfully submitted this 1st day of August, 2011.

/S/

Jonathan D. Reed

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 1st day of August, 2011, I deposited a true and correct copy of the foregoing APPELLANT'S BRIEF, in the prison mail system, first class postage prepaid, to be mailed to the Clerk of the Court and each of the following individuals:

OFFICE OF THE IDAHO STATE ATTORNEY GENERAL
Criminal Law Division
P.O. Box 83720
Boise, ID. 83720-0010

HON. CHERI C. COPSEY
District Court Judge
Ada County District Court
200 W. Front St.
Boise, ID. 83720-7300

J. LAYNE DAVIS
Davis & Walker
200 N. 4th St. Ste 302
Boise, ID. 83702

/S/

Jonathan D. Reed